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LATHAM & WATKINS LLP

November 20, 2017

VIA ECFS

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: *Restoring Internet Freedom*, WC Docket No. 17-108

Dear Ms. Dortch:

On November 16, 2017, the undersigned and Matthew Murchison of Latham & Watkins LLP, along with Rick Chessen of NCTA – The Internet & Television Association ("NCTA"), met with Jay Schwarz, Wireline Advisor to Chairman Pai, regarding the above-referenced proceeding. Also that day, we met regarding the same proceeding with Kris Monteith, Daniel Kahn, Madeline Findley, Deborah Salons, and Melissa Kirkel (by phone) of the Wireline Competition Bureau; with Jacob Lewis, Scott Noveck, and Marcus Maher of the Office of General Counsel; and with Betty McIntyre of the Wireless Telecommunications Bureau.

At these meetings, we reiterated NCTA's strong support for restoring the Commission's prior classification of broadband Internet access service ("BIAS") as an interstate information service and reversing the 2015 decision to classify BIAS as a Title II telecommunications service. We explained that the record strongly supports an information service classification based on the functional attributes of BIAS and the policy benefits of eliminating the overhang of common carrier regulation. We also urged the Commission to include in its order a clear, affirmative ruling that confirms the primacy of federal law with respect to BIAS as an interstate information service and that expressly preempts state and local efforts to regulate BIAS. Specifically, we explained that the Commission should make clear that federal law occupies the field with respect to direct regulation of the provision of BIAS and accordingly preempts state and local regulation in that field. The Commission also should specify that preemption extends to indirect state and local regulation of BIAS that results from the application of generally applicable laws in a manner that conflicts with or stands as an obstacle to accomplishing the objectives of federal law and policy. We noted that such an approach would be consistent with the preemption analysis set forth in the Commission's recent amicus brief filed in the Eighth Circuit in *Charter Advanced Services (MN), LLC v. Lange*.[1]

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[1] *See* Brief of the Federal Communications Commission as Amicus Curiae at 7-13, *Charter Advanced Services (MN), LLC v. Lange*, No. 17-2290 (8th Cir. Oct. 27, 2017).

We also explained that, regardless of whether Section 706 provides authority to adopt substantive open Internet rules, that provision supports the preemption of state and local regulation of BIAS as a means of ensuring a pro-investment, pro-deployment regulatory environment. As the Commission's recent amicus brief notes, Section 706 "directs the FCC to 'encourage the deployment . . . of advanced telecommunications capability' through 'measures that promote competition in the local telecommunications market,' including by 'remov[ing] barriers to infrastructure investment.'"[2] The brief then goes on to explain that "maintaining a federal policy of nonregulation facilitates the development of Internet applications and increases demand for broadband service, which will in turn drive further broadband investment and deployment."[3]

Moreover, the fact that Section 706 also refers to "state commissions" does not undercut its use as a basis for preemption. The D.C. Circuit has held that Section 706 can reasonably be construed to "vest the Commission with actual authority to utilize . . . 'regulating methods' to meet" the "stated goal of promoting 'advanced telecommunications' technology."[4] A reading that *also* gives states and localities the ability to enact laws that countermand federal policy would render this recognition of federal authority under Section 706 a nullity. Indeed, the D.C. Circuit's ruling necessarily means that the Commission has authority to use "regulatory methods" to preempt state and local broadband laws, particularly those that frustrate Section 706's broadband deployment goals—for "a federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation and hence render unenforceable state or local laws that are otherwise not inconsistent with federal law."[5] And if the Commission construes Section 706 as warranting adoption of a *deregulatory* policy framework, that determination likewise would support preempting states and localities from relying on Section 706 as a source of affirmative authority for imposing regulations on BIAS. NCTA has consistently cautioned about the effects that failing to preempt state and local regulation of BIAS would have on ISPs, which would be forced to comply with a patchwork of overlapping and potentially conflicting state and local obligations absent federal preemption.[6] We also noted NCTA's agreement with other parties that have identified additional sources of preemptive authority in the Act, including Sections 3, 303, and 230(b)(2).[7]

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2 *Id.* at 12.

3 *Id.*

4 *Verizon v. FCC*, 740 F.3d 623, 637-38 (D.C. Cir. 2014).

5 *City of New York v. FCC*, 486 U.S. 57, 63-64 (1988) (internal quotation marks and citations omitted).

6 *See, e.g.*, Comments of NCTA, WC Docket No. 17-108, at 63-68 (filed Jul. 17, 2017); Comments of NCTA, GN Docket Nos. 14-28 and 10-127, at 86-87 (filed Jul. 15, 2014).

7 *See, e.g.*, White Paper, "FCC Authority To Preempt State Broadband Laws," at 12-16, attached to Letter of William Johnson, Verizon, to Marlene Dortch, Secretary, FCC, WC Docket No. 17-108 (filed Oct. 25, 2017).

Finally, we explained that, if the Commission chooses to retain its transparency rule, it should eliminate the uncodified "enhancements" to the rule set forth in the *Title II Order*.[8] As NCTA and other parties have explained, the "uncontroverted record developed in connection with the [Paperwork Reduction Act] review process confirms that costs and burdens arising out of steps that must be taken to comply" with these "enhancements" are "significant."[9] And Chairman Pai has correctly observed that the enhanced disclosure obligations provide "little if any benefit to consumers" and divert resources from efforts to "deploy faster and more sophisticated broadband networks."[10]

Please contact the undersigned with any questions regarding this submission.

Respectfully submitted,

/s/ Matthew A. Brill

Matthew A. Brill
of LATHAM & WATKINS LLP

cc: Madeline Findley
Daniel Kahn
Melissa Kirkel
Jacob Lewis
Marcus Maher
Betty McIntyre
Kris Monteith
Scott Noveck
Deborah Salons
Jay Schwarz

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8 *See Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601 ¶¶ 163-71 (2015).

9 Letter of Rick Chessen, NCTA, and Jonathan Banks, USTelecom, to Marlene Dortch, Secretary, FCC, at 2, GN Docket No. 14-28 (filed Feb. 3, 2017) (quoting Request for Stay, Competitive Carriers Association, Wireless Internet Service Providers Association, NTCA – The Rural Broadband Association, and American Cable Association, at iv, GN Docket No. 14-28 (filed Jan. 13, 2017)).

10 Remarks of FCC Commissioner Ajit Pai Before the Heritage Foundation, Feb. 26, 2016, at 4, *available at* https://apps.fcc.gov/edocs_public/attachmatch/DOC-337930A1.pdf.